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In the Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, *et al.*,
Petitioners,

v.

BRENDA ROE AND ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATHOLIC CHARITIES USA, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, LUTHERAN SERVICES IN AMERICA, AMERICAN FRIENDS SERVICE COMMITTEE AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Each of the *amici* provides services to the disadvantaged and has a strong interest in opposing the improper denial of welfare benefits.[1]

[1] Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters accompany this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to the preparation or submission.

Catholic Charities U.S.A. is the nation's largest private social service organization. Its network of 1,400 agencies and institutions serves more than 10.5 million people of all religious, national, racial, and social backgrounds each year. Catholic Charities' services emphasize enabling people to achieve self-sufficiency.

The National Council of the Churches of Christ in the U.S.A. (NCC) is the nation's oldest and largest ecumenical body representing 35 Protestant, Anglican and Orthodox member communions that have an aggregate membership in excess of 53 million. The NCC does not purport to speak for all of its members but rather for its 270-member General Assembly.

Lutheran Services in America is an alliance of the Evangelical Lutheran Church in America, the Lutheran Church – Missouri Synod and their social ministry organizations. Lutheran Services in America provides social services, housing and health care in 3,000 communities across the United States, through 97,000 employees who deliver $3.2 billion in services annually. As a basic principle, Lutheran Services in America is called to give these social ministry organizations an effective voice for service and justice to church, to government, and to society.

From its creation eighty-one years ago, the American Friends Service Committee has worked across the United States and internationally in support of the efforts of poor and excluded groups to overcome economic deprivation. The AFSC carries out its work as a social justice arm of the Religious Society of Friends (Quakers). Over these years the AFSC has worked in partnership with low income people seeking fairness and security for people who need public assistance. In February 1998, the AFSC adopted a statement entitled *The Human Crisis of Welfare Reform*, which states that ". . . government at all levels has an essential

responsibility to assure economic security." As a national religiously-based organization with offices in California, AFSC has a strong interest in this litigation, which affects this state and the nation as a whole.

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, is dedicated to defending the civil, political, and economic rights of all Americans. AJC has a long history of activism on the issue of public assistance to the poor and is committed to advocating policies that seek to combat poverty, to preserve and promote families, and to enhance self-sufficiency. AJC is especially sensitive to the need for open and liberal migration and immigration policies, which have proved critical to Jews the world over and are central to the American federal framework. We should remember that our nation is a country founded and enriched by those who had the courage and fortitude to seek out opportunity in order to create prosperous and secure homes for their families.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2 provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV, Section 1 provides in part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Section 11450.03 of the California Welfare and Institutions Code provides that welfare payments to any family that moved from another State and has resided in California for less than twelve months are limited to the amount the family would have received in its State of prior residence. Respondents, former residents of Oklahoma and the District of Columbia who are now concededly bona fide residents (and therefore citizens) of California, brought this suit challenging § 11450.03 on the ground that it impermissibly burdens their right of interstate migration and denies them equal protection of the laws with other California citizens. The district court preliminarily enjoined the operation of § 11450.03, and the court of appeals affirmed, stating that "the apparent purpose of § 11450.03 was to deter migration of poor people to California." (Pet. App. at 9.)

SUMMARY OF ARGUMENT

One of the most basic principles of our federal union is that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872). Citizens choose States, and not the other way around. Citizens choose States for a wide variety of reasons: economic opportunity, responsive government, unintrusive government, high benefits such as good schools or superior care for the elderly, low income or inheritance taxes, space and physical beauty, and personal and family attachments. Whatever the individual's reasons, a State is not free to deny residence to any citizen of the United States, or to deny the benefits of State citizenship to any such resident, or to "requir[e] newcomers to accept a status inferior to that of all oldtime residents of [the State] upon their arrival." *Attorney*

General of New York v. Soto-Lopez, 476 U.S. 898, 922 (1986) (O'Connor, J., dissenting).

Our federal union *works* because citizens of the United States can freely choose their States. It works as a system of government because the States compete to offer governmental policies that citizens of the United States will find attractive—and are *not* free to cater only to current residents and other persons of their own choosing. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("government [is made] more responsive by putting the States in competition for a mobile citizenry"). Our national economy works better because citizens can migrate freely to States where they perceive attractive economic opportunities and protections—and States are *not* free to reserve their opportunities or protections for their current citizens. *See Soto-Lopez*, 476 U.S. at 908-09. And federalism protects individual freedom in part by enabling each individual to escape any State sovereign he or she finds oppressive and choose a more congenial one.[2]

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[2] There is no better example of the central importance of the right to migrate within the United States, and of how this right protects political liberty, than the Great Migration of blacks to the North after the Civil War. *See* 1 Gunnar Myrdal, *An American Dilemma* 182-201 (1944); *see also* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 783 (1998) ("Group migrations were significant for several reasons. . . . [S]uch migrations were sometimes a form of political protest, one of the few forms of protest in which disenfranchised African-Americans could engage. African-Americans frequently deserted regions in response to lynchings and other forms of white lawlessness, or in response to unfavorable legislation. African-Americans would move to places where they were relatively well treated or had relatively good economic prospects. . . . Finally, and perhaps most important, mass migration, and even the threat of such migration, was crucial to improving the treatment of African-Americans by white Southerners.") (footnotes omitted).

Each citizen's right to choose and to change his or her State of residence and citizenship is "so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 758 (1966). Like other rights that are central to the very nature of citizenship in our federal union (*e.g.*, voting rights), the right to choose one's State is reflected throughout the constitutional text. The provisions that provide the direct foundation for each citizen's right to choose his or her State of residence are found in Article IV and the Fourteenth Amendment.

The Privileges and Immunities Clause of Article IV, which bars each State from denying citizenship privileges to citizens of other States, by necessary implication also bars a State from denying such privileges to its own citizens on account of their *former* residence in another State. The Fourteenth Amendment adds three clauses that, in the aggregate, define the origin of citizenship and prohibit a State from infringing on that right. First, the Citizenship Clause prescribes the sources of both federal citizenship (native birth or naturalization) and State citizenship (residence in the State) and requires each State to accept, as a citizen, any citizen of the United States who chooses to become a bona fide resident of the State. *See* U.S. Const. amend. XIV, § 1. Second, the Privileges and Immunities Clause bars each State from denying any citizen of the United States the privileges and immunities of national citizenship—which under the Citizenship Clause include the right to choose one's State of residence (and therefore of state citizenship). *Id.* Third, the Equal Protection Clause prohibits any State from denying the "equal protection of the laws" to any person within its jurisdiction. *Id.* As interpreted by this Court, the Equal Protection Clause bars a State from granting benefits to some of its citizens and denying them to others without appropriate justification; once an individual has established

bona fide residence (and hence citizenship) in a State, former residence in a different State is *never* an acceptable justification for significantly different treatment.

The obvious purpose of § 11450.03 is to deter undesired citizens of other States—poor people who need welfare assistance or fear that they might—from choosing to become residents and citizens of California. It achieves that end by dividing California's own citizens into more than fifty different classes, based on where they (or, in the case of newborns, their parents) resided a year earlier; it then grants higher welfare benefits to those who resided in California (or France) and lower benefits to those who (or whose parents) resided in Oklahoma or the District of Columbia. As the Solicitor General acknowledges more forthrightly than California does, the only conceivable reason for limiting welfare benefits for California citizens to levels established by their States of former residence is to keep the poor, quite literally, in their places. (*See* U.S. Br. at 20.)

California cannot constitutionally erect this significant barrier—and the whole premise of California's statute and of its argument in this case must be that it *is* a significant barrier[3]—to migration of United States citizens into the State.

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[3] This is not to say that California's premise is either (i) correct or (ii) a complete statement of the consequences of the California one-year requirement.

(i) Citizens of other States who learn that California has higher stated benefits surely also learn about California's higher cost of living. Whether anyone is actually motivated to move to California by the promise of higher stated benefits thus remains to be shown. But materials filed in this case seem to show that poor people who move tend, on average, to move to States with *lower* benefits, while other people, as one would expect, move in equal numbers to states higher and lower on the benefit scale. Poor people therefore apparently tend, when they move, to seek a lower cost of living rather than higher benefits. (*See* Brief for

(continued...)

California may, of course, deny some of the benefits of California citizenship (*e.g.*, in-state university tuition levels) to *non*-California citizens, *see Vlandis v. Kline*, 412 U.S. 441 (1973), and it may establish durational and other requirements designed to assure that claims of residence are bona fide, *see Sosna v. Iowa*, 419 U.S. 393 (1975); there is, however, no contention in this case that respondents are not bona fide residents and full citizens of California with an intention to remain in California indefinitely.

California may not, however, establish a benefit program, set levels of benefits it deems appropriate for California citizens, and then reserve those benefit levels for long-term citizens in order to deter migration by other citizens of the United States seeking the same benefits. *See* William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Commentary 9, 17 (1984) ("A state's decision that old-timers deserve a greater share of state-owned resources cannot be squared with a constitutional structure that demands that newcomers be treated as full members of the state community.") A State may choose to impose low taxes on its residents, but it obviously cannot "protect" this policy against tax-motivated

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[3] (...continued)
Social Scientists.)

(ii) The one-year requirement clearly penalizes persons who did *not* enter the State with any expectation of seeking welfare benefits: an immigrant from Oklahoma who has never sought or thought about welfare benefits, and who comes to California because her employer transfers her, or to accept a promised job, or to flee an oppressive husband, and who then loses her job, is limited during her first year of residency in California to the benefits she would have received if she had lost her job in Oklahoma; a child born within California to parents who recently migrated to California is similarly limited to benefits set by a State with which the child may have no connection whatsoever. (*See* Pet. App. at 18.)

in-migration by taxing new residents at the rates set by their former States. *Cf. Williams v. Vermont*, 472 U.S. 14, 23 (1985). A State may choose to provide especially good schools, or outstanding support for the elderly, or superior welfare benefits, but it cannot "protect" any of these policies by denying them to bona fide but new State residents. Even if participation in a federal union sometimes deters a State from offering benefits that might make that State too attractive to other Americans—a problem of which there is no evidence here—barriers against interstate migration are not an acceptable solution.

Congress does not have the power to authorize a State to discriminate against new State citizens in order to deter in-migration by persons seeking benefits the State chooses to provide. The right of each citizen of the United States to choose his or her State of residency is not a mere corollary of the freedom of interstate commerce. It is a right of national citizenship inherent in the structure of government created by the Constitution and specifically protected against both federal and State abridgement by the Citizenship Clause of the Fourteenth Amendment. *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (characterizing the right to migrate as a "fundamental personal right"). Nothing in the Constitution gives Congress the power to curtail, or authorize States to curtail, that right of national citizenship.

ARGUMENT

THE CALIFORNIA WELFARE RESIDENCY LAW IS UNCONSTITUTIONAL BECAUSE IT LIMITS WELFARE BENEFITS PAID TO CERTAIN BONA FIDE CITIZENS OF CALIFORNIA SOLELY BECAUSE OF THEIR FORMER RESIDENCE IN OTHER STATES

Every citizen of the United States has a right to choose, and change, his or her State of residency and citizenship. Each individual may base his or her choice upon any set of perceived advantages that each State offers its citizens, including the kinds and magnitude of governmental benefits. Each State, in turn, may decide what benefits to provide its citizens and may allocate such benefits on the basis of any appropriate classifications. But no State may *choose* its citizens, or reserve its benefits for *current* State citizens, or seek to deter undesired migration of other United States citizens by classifying its own citizens on the basis of their former residence in other States.[4] Specifically, California cannot protect its supposedly superior welfare benefits by

[4] A State's decision to limit a citizen's access to necessities—*e.g.*, health care or subsistence cash payments—on account of recency of migration is particularly troubling. *Cf. Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) ("governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements"). One reason for this is that there is an exaggerated effect on the right to migrate itself: a person who might wish to locate in a particular State for a combination of reasons, and whose concern with (say) health care is only one minor point, may nevertheless be deterred from migrating at all if she fears that an unexpected health problem could be catastrophic. Similarly, a person otherwise eager to come to California to accept a better job, and who has no history or expectation of relying on welfare, may be deterred by the thought that if the job does not pan out she will be living in a new and more expensive State with assistance mysteriously limited by her State of former residence.

denying such benefits to some of its own citizens in order to deter in-migration, and Congress cannot authorize California to do so.

A. It Is a Basic Principle of Our Federal Union That Every Citizen of the United States Has a Right To Choose, and Change, His or Her State of Residency and Citizenship

As Justice O'Connor said in the *Zobel* case,

> It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[5]

The principle that every citizen of the United States enjoys a right to change State of residency and therefore citizenship is—but is not merely—a matter of individual rights. *See Dunn*, 405 U.S. at 338. Even more importantly, as Justice O'Connor recognized, it is a structural principle of our federal union. *See Zobel*, 457 U.S. at 73. States choose their governmental policies, but individual citizens of the United States choose States on the basis of all their policies and other amenities. In a federal union, States are encouraged to be "laboratories,"[6] experimenting and competing to offer attractive conditions of life, precisely because they are *not*

[5] *Zobel v. Williams*, 457 U.S. 55, 76-77 (1982) (O'Connor, J., concurring) (citation omitted); *see* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 518 (1981).

[6] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

permitted to cater only to the people who already live there.[7] And federalism protects the liberties of individuals precisely because the freedom to migrate between States means that each individual is subject to two chosen sovereigns, not confined in a single (albeit joint) sovereignty. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *Zobel*, 457 U.S. at 73 (O'Connor, J., concurring). Accordingly, the right of each citizen to choose and to change his or her State of residence has been recognized from the early days of the Republic. *See generally Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (holding that fundamental rights protected by Privileges and Immunities Clause of Article IV include "[t]he right of a citizen of one state to pass through, or to reside in any other state").[8]

Like other very fundamental principles, the right to choose one's State of residency and therefore

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[7] Petitioner and its *amici* concede, in varying degrees, the right of Citizens of the United States to choose and change their State of residence. (*See* Pet. Br. at 15, 26; Inst. for Justice Br. at 5; Brief for Washington Legal Found. at 13; Brief for Pacific Legal Found. at 15; Brief for Pennsylvania *et al.* at 5-6.)

[8] The point is not merely theoretical. Statutes like § 11450.03 pose a serious threat to the national mobility of poor people (including people who are working but fear that they could need welfare assistance). Fifteen states apparently now "provide that new residents receive [welfare cash] benefits at the level received in their prior State until one year has elapsed." (Brief for the Nat'l Ass'n of Governors Br. at 12 & n.4.) The proliferation of such laws will keep the poor literally in their places, deterring migration to more prosperous States, even though such migration is exactly what a country with a national economy should seek to encourage. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (mentioning "the important role that [right of interstate migration] has played in transforming many States into a single Nation"); *cf. Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (noting that Commerce Clause was intended to preclude "interlocking local economic regulation").

citizenship—the "Choice of State Principle"—is embodied in more than one provision of the Constitution.[9] As *amicus* Institute for Justice concedes (Inst. for Justice Br. at 5), the "right to migrate . . . is a descendant of Article IV Privileges and Immunities and now the Fourteenth Amendment as well." In the beginning, the Privileges and Immunities Clause of Article IV was intended to guarantee citizens of any of the United States the right to move about and be recognized as such in any other State in the Union. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); *Campbell v. Morris*, 3 Har. and McHen. 535, 553 (Md. 1797). In that regard, the Clause embodies the principle expressly articulated in Article IV of the Articles of Confederation, *see* 3 M. Farrand, *Records of the Federal Convention of 1787*, at 112 (1934), which provided explicitly for a right of ingress and egress between States. Articles of Confederation art. IV, para. 1 (1781). But, in *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417-18 (1856), this Court tragically held that the privileges and immunities protected under Article IV, Section 2 were limited to rights authorized by State law.[10]

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[9] *See* Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787* at 189-92 (1956) (disapproving of traditional sources for right and advocating adoption of due process liberty rationale); Duane W. Schroeder, Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117, 117-22 (1975) (explaining textual sources of right); *cf. Sigler v. Berrigan*, 410 U.S. 902, 902 (1973) (Douglas, J., dissenting) ("The right to travel is a peripheral right of every citizen under the First Amendment.").

[10] There is historical evidence that, even prior to the Court's 1856 decision in *Dred Scott*, southern States consistently ignored Article IV by failing to grant abolitionists or freed slaves the privileges and immunities associated with their citizenship in northern States. *See Elkison v. Deliesseline*, 8 F. Cas. 493 (D.S.C. 1823) (No. 4,366) (holding unconstitutional a South Carolina law mandating incarceration, during the pendency of his ship's stay in port, of any freed black sailor whose ship docked in the State); Paul Finkelman, *An Imperfect Union* 109-11 & n.28

(continued...)

The Fourteenth Amendment overruled *Dred Scott* in two important steps. First, it declares that any citizen of the United States must be recognized as a citizen by the State in which he or she chooses to reside. *See* U.S. Const. amend. XIV, § 1. As a result of the Fourteenth Amendment, "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872). The Citizenship Clause thus requires that each United States citizen be accepted as a citizen of the State in which he resides, as long as he is "without any present intention to remove therefrom." *Martinez v. Bynum*, 461 U.S. 321, 331 (1983). Second, the Privileges and Immunities Clause of the Fourteenth Amendment bars any State from abridging its citizens' rights of national citizenship. *See Thornton*, 514 U.S. at 843-44 (Kennedy, J., concurring). And one of those rights of national citizenship is the right to change residence from one State to another. On this point, Justice Jackson had it exactly right:

> This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring). Finally, the Fourteenth Amendment also bars

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[10] (...continued)
(1981); *cf.* Paul Finkelman, *States' Rights North and South in Antebellum America, in An Uncertain Tradition* 125, 151 n.18 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (discussing mistreatment of white abolitionists by Southern authorities).

any State from denying any person the equal protection of the laws. A State may not accord different benefits to different classes of its own citizens without an appropriate justification, and this Court has repeatedly held that former residence in another State is no justification at all. *See, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985); *Zobel*, 457 U.S. at 60 n.6; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

The Court's right to travel jurisprudence, like its decisions concerning the right to vote, fits squarely at the center of the "rational continuum" of rights upon which liberty depends. *See Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). And the Court's uninterrupted endorsement of the "Choice of State" principle from the earliest days of the Republic affirms that each U.S. citizen's right to take up residence, and by implication citizenship, in any State is "deeply rooted in our legal tradition." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997); *cf. Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (holding that settled doctrine should be disturbed only in extraordinary circumstances).

The Choice of State principle obviously means that California simply cannot say, "We do not want, and will not allow, citizens of Oklahoma (or the District of Columbia, or other States generally) to migrate and take up residence here." Equally obvious, California cannot erect such barriers against *subsets* of residents of other States. Thus, California cannot say, "We do not want, and will not allow, poor citizens of Oklahoma, or citizens of Oklahoma with many children who will fill up our schools, to migrate and take up residence here."

Nor may California bar a discrete class of immigrants—in this case the poor—from entry by denying to all new

California citizens a benefit to which all other eligible Californians are entitled. That is to say, the Choice of State principle prohibits both direct impediments to entry and indirect policies designed to effect the same end. *Cf. Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (noting that the right to vote is protected from "sophisticated as well as simple-minded modes of impairing the right guaranteed" (quotation omitted)); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (noting that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied"). As one scholar has summarized:

> United States citizens become citizens of the States wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.

William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 79 (1994) [hereinafter Cohen, *Update*].

A State may, of course, deny some of the benefits of California citizenship to persons who are physically present but are *not* citizens. *See, e.g., Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (permitting imposition of surcharge on hunting licenses sold to nonresident hunters). Moreover, although a State must accord State citizenship to any resident, it may insist on bona fide residence and may sometimes impose duration requirements as a way of

establishing the requisite commitment to the State.[11] But there is no dispute in this case that respondents are bona fide residents and citizens of California, and neither California nor the United States has suggested that the requirement at issue is designed to weed out persons whose claim of residence is not genuine. Petitioners and their *amici* cite *no* case holding that a State may distinguish among admittedly bona fide citizens based on duration of residency. Citizenship is an indivisible status that may not be granted in half steps. *See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

B. Section 11450.03 Violates the Constitutional Choice of State Principle and Denies Equal Protection to Citizens of California

The constitutional right to interstate travel, which is a privilege and immunity of national citizenship, "is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978). That right is composed not only of a right of ingress and

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[11] This Court's decisions sustaining duration-of-residence requirements for particular State benefits have been explained by the Court itself, or are readily explainable, as based on the State's right to insist on genuine residency. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents."). *See* William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Commentary 9, 18-19 (1984). In particular, in the case of transportable benefits such as a divorce decree or a college education, the Court has allowed States to impose duration requirements rather than accord these benefits to individuals who may be merely passing through. Petitioner suggests that *Sosna v. Iowa*, 419 U.S. 393 (1975), endorses "temporary depriv[ation] . . . of . . . right[s]" to newcomers. (*See* Pet. Br. at 26.) But in *Sosna*, which upheld a one-year residency requirement to obtain a divorce, the provision in question was a reasonable expression of the State's desire to ensure that those seeking divorces were bona fide residents, not transients seeking to use the State's liberal divorce laws. *See* Cohen, *Update*, *supra*, at 74.

egress, *see Passenger Cases*, 48 U.S. (7 How.) 283 (1849), but also of a right to settle in the State of one's choice, *see Edwards v. California*, 314 U.S. 160, 173-74 (1941). A State may not inhibit an individual's right to choose his or her State of residence by penalizing new citizens for the recency of their arrival, *see Hooper*, 472 U.S. 612; *Zobel*, 457 U.S. 55; *Soto-Lopez*, 476 U.S. 898, or by discouraging them from coming at all, *see Williams v. Vermont*, 472 U.S. 14 (1983); *Shapiro*, 394 U.S. 618; *Edwards*, 314 U.S. 160. Section 11450.03 does both: it inhibits individuals' exercise of the right to choose California by curtailing the extent of state citizenship to which recent immigrants are entitled upon arrival in California. *See Zobel*, 457 U.S. at 59 n.6.

As the courts below recognized (Pet. App. at 9, 29-30), the sole purpose of Section 11450.03 is to deter residents of other States from moving to California if they will, or have any fear that they soon may, apply for welfare benefits. That purpose is not constitutionally permissible, and California cannot constitutionally discriminate among its own bona fide citizens in order to achieve it.

Although California in its brief before this Court neither acknowledges that its purpose is to deter in-migration by citizens of other States who will or may need welfare assistance nor articulates any other purpose served by the provision,[12] there is simply no other intelligible reason for California to divide its citizens into more than fifty classes based on States or territories of former residence, and then to

[12] In oral argument below, "the state conceded that it does not want people to move to California 'with a mind-set of economic dependency'." (Pet. App. at 10.) California also argued below that the provision saves money (*id.* at 26), but if its only purpose were to lower its costs, it obviously could do so far more simply by a very small across-the-board reduction (*id.* at 31 n.20). If California had some justification for providing lower benefits to first-year residents, it could also do that in a simple, across-the-board manner.

administer more than fifty different sets of benefit limits. The limits established by the Oklahoma legislature have no relevance to the appropriate level of support for respondent Roe *as a bona fide resident and citizen of California*. That level has been established by the California Legislature for all residents of California, and Roe's former residence in Oklahoma has no bearing on her present needs or deserts. The Oklahoma-based limit serves no purpose as applied to California citizens, who have already left Oklahoma behind, except to save a small amount of money by an arbitrary discrimination.[13] California's adoption by reference of Oklahoma's limit is explicable only by examining its effect at the point when a resident of Oklahoma is deciding whether to move to California. Its purpose is to say *at that point*, "Don't come thinking you will get higher benefits here, because you won't for a year, so stay where you are."

Section 11450.03 therefore violates the Constitution in two ways. First, it violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment by denying to citizens of *other States* the right to take up residence in California and receive the full benefits that California confers on its citizens. Second, it violates the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment by denying to some citizens of *California* benefits conferred on other Californians, without any constitutionally permissible justification for the distinction.

The Privileges and Immunities Clauses, which embody a right of citizens of one State to migrate to another State and be accorded full rights of citizenship there, do not permit

[13] The State's discrimination is arbitrary (1) because it assigns benefits according to no discernible principle of California public policy and (2) because the amount to which any individual recipient is entitled bears no relation to her status as a California citizen.

California to deny full California citizenship to former residents of Oklahoma or the District of Columbia. Citizens of other States may move to California seeking any number of perceived benefits: beautiful scenery, extensive job opportunities, better schools, lower taxes, better support for the elderly or the indigent. The very nature of national citizenship, embodied in the Clauses, means that California cannot reserve these benefits for its own *current* citizens and others of its own choosing.

Examples abound. California may want to limit development of its coastline, but it obviously cannot do so by singling out newcomers from other States and barring them from buying or building houses with ocean views. California may want to protect its special economic opportunities, but it cannot specially deny new citizens from other States the right to search for gold or manufacture computers. California may want to prevent school overcrowding, but it cannot refuse school places to new citizens in order to eliminate this motive for migration. Welfare benefits are merely one of the features of California citizenship, and like the others they cannot be denied to new California citizens in order to deter migration. *Cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.")

The Equal Protection Clause of the Fourteenth Amendment bars California from granting a benefit to one class of its own citizens, and denying the benefit to another class, without an acceptable justification for doing so. Whether the justification need be merely "rational," or must be "substantial" or "compelling," depends on the nature and importance of the benefit and on whether the classification is

itself "suspect." If the Court addresses this level-of-scrutiny question in this case, it should adhere to its past rulings that the right of every citizen of the United States to choose his or her State of residence is so fundamental that a State classification based on recent exercise of that right is suspect and requires a compelling justification. *See Shapiro*, 394 U.S. at 627; *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972). But this case can be decided without reference to level of scrutiny, because the only proffered justification for treating citizens of California differently depending on where they *formerly* lived—the need to eliminate an incentive for migration—is not a constitutionally permissible justification *at all*.

This justification is proffered not by California but by the Solicitor General, who argues that State laws like Section 11450.03 serve two related purposes: first, to allow the States to eliminate any incentive to migrate from a low-benefit State to a high-benefit State; second, to prevent a "race-to-the-bottom," in which each State, fearing an inundation of applicants, seeks to keep its benefits the lowest in the Nation.[14] But both of these purposes are permissible only if a State may attempt to deter migration by citizens of the United States who are seeking benefits that the State has chosen to offer its citizens. As the Solicitor General concedes, both of his purposes are achieved only if, and only to the extent that, laws like Section 11450.03 actually deter,

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[14] The postulated worries are not entirely plausible. As to welfare migration, see *supra* n.3. As to the "race to the bottom," very significant differences between state welfare benefit levels have persisted despite this Court's decision 29 years ago in *Shapiro*, a fact which suggests that high-benefit States have sufficient in-state reasons to keep their benefits high. The more likely real motive behind Section 11450.03 and similar provisions is that States simply prefer not to have to accord full benefits to even a few poor newcomers.

or at least are perceived to deter, interstate migration that would otherwise take place.[15] Although the Solicitor General has carefully phrased his statement of purposes to avoid implying any State animus against poor immigrants from other States, the burden on interstate migration is not incidental; it is purposeful and direct. California's intention is to provide what it thinks is an appropriate level of support for its own *current* citizens, while at the same time preventing poor people from Oklahoma and other States from moving in and getting the same benefits.

There are all kinds of benefits and amenities of citizenship in a given State that the State may wish (i) to reserve for current residents, (ii) to neutralize as incentives for undesired in-migration, or (iii) to preserve against the risk that they will be destroyed or rendered impractical by excessive demand.[16] But a State cannot achieve any of these objectives by discriminating against its new citizens.

Consider, for example, State recreational opportunities. A State may wish to provide its current citizens very attractive State parks but fear that (i) if too attractive they will become overcrowded, (ii) they will induce migration to the

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[15] *See, e.g.*, U.S. Br. at 12 (quoting H.R. Rep. No. 104-651, at 1337 (1996) to the effect that the evil to be prevented is families moving "across State lines to maximize welfare benefits"), 13 (quoting *States' Perspective on Welfare Reform: Hearing Before the Senate Comm. on Finance*, 104th Cong. 9 (1995) (statement of Sen. Graham) (saying that it "is not in the nation's interest to be trying to stimulate that kind of population movement [created by welfare discrepancies]"), 14 (welfare recipients should not be "transient"), 16 ("race to the bottom" caused by fact that "there is no restriction on interstate migration").

[16] Our whole tradition is, of course, to the contrary: it assumes that States will adopt attractive policies in order to compete for citizens: "That choice of residence was subject to local approval is contrary to the inescapable implications of the western movement of our civilization." *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

State when it would prefer to limit its population, and (iii) *the State legislature and its current population will be much less willing to spend State funds to support State parks if their use cannot be limited to current citizens and must be shared with newcomers*. These arguments about the effects of State spending on parks are exactly parallel to the Solicitor General's arguments about State spending on welfare benefits. Moreover, they are logical and plausible arguments that may well support steps at the federal level to offset State underspending. But if offered as justifications for denying new State citizens the right to visit State parks, they are clearly impermissible.

Many other examples are equally indistinguishable from welfare benefits in this respect. States may wish to preserve for their current residents, and not share with newcomers, their coastlines, their mountains or forests, their factory job opportunities, their civil service job opportunities, their farmland, the economic benefits of their natural resources, their superior schools, and an unlimited range of governmental policies—relating to taxes, regulation of persons and property, and individual welfare—that they perceive to be superior to the policies of other States. But *as long as the newcomers are citizens of the United States who have chosen to become State residents*, the State is simply not permitted to exclude them from any of these benefits on grounds of newness to the State. Allowing a State to do so would be inconsistent with the principle that citizens of the United States choose their States, and not vice versa. If a State truly cannot afford a particular benefit or policy unless it can deny that benefit or policy to newcomers, then the State must adopt benefits and policies it can afford to share.

Fears of a "race to the bottom" cannot justify States in deterring citizens of the United States from taking up residence in States they find attractive. The mobility of the

national population has many, perfectly genuine, "spillover" effects on State spending, causing spending to be higher or lower than the State would choose if it could limit the benefits to its own current citizens. These effects are often cited as justifications for federal spending or federal restrictions to offset what are perceived to be distortions.[17] But these effects have never been thought to justify limiting the mobility of the population or denying benefits to bona fide migrants. On the contrary, one of the basic virtues of a federal system is that citizens of the United States may "vote with their feet," choosing the State whose laws and policies suit them best. *See Zobel*, 457 U.S. at 77. Benefits offered by the several States, including those that are partially federally funded, are among the reasons people may choose to move to a new State. *All* such choices are preferences of one set of laws and regulation, and one State government, over another.

This Court has repeatedly held that States may not deny benefits to in-migrants from other States merely because they wish to avoid in-migration by persons seeking such benefits. *See Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (welfare benefits); *Memorial Hosp.*, 415 U.S. at 263-64 (high levels of public health care); *Zobel*, 457 U.S. at 63 (resource dividends); *Soto-Lopez*, 476 U.S. at 905 (veterans' civil service preference). Citizens of one State *may* choose to move to a new State on the basis of any of a wide range of benefits the new State is perceived to provide, including welfare benefits. Neither the new State nor Congress can reserve the benefits of public education, public health, old age care, use of State lands and facilities, or welfare benefits

[17] It is commonplace, for example, that each State tends to underspend on schools because children grow up and move elsewhere, and many advocates of federal support invoke this spillover effect as a reason for the underspending.

for current citizens without changing the meaning of a federal union.

C. Congress Has No Power To Authorize Statutes Like Section 11450.03

After Section 11450.03 was enacted, Congress adopted Section 604(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604(c), which provides in pertinent part as follows:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

The Solicitor General argues that this congressional approval of a category of State provisions into which Section 11450.03 may fall could save the provision from unconstitutionality. (U.S. Br. at 22.) But nothing in the Constitution empowers Congress (i) to deny or impede (or authorize California to deny or impede) the right of citizens of Oklahoma and other States to take up residence in and become citizens of California or (ii) to deny (or authorize California to deny) to respondents, as bona fide citizens of the United States and California, the full benefits of that citizenship as determined by California. Congress, of course, has plenary power to regulate interstate commerce, but the right at issue in this case does not rest on the Commerce Clause. The right of every citizen of the United States to choose his or her State of residence, and be accorded full rights of citizenship in the chosen State, is not Congress's to give away.

The Solicitor General rests his argument that congressional authorization can legitimize State measures to deter migration primarily on an asserted national interest in

interstate commerce. (U.S. Br. at 23.) But although the Commerce Clause has been said to be one source of the right to travel, *see Edwards v. California*, 314 U.S. 160 (1941),[18] and the Commerce Clause plainly does give Congress the power to regulate the interstate *transportation* of people, *see Passenger Cases*, 48 U.S. (7 How.) 283, 401 (1849), this Court has never to our knowledge suggested that the Commerce Clause gives Congress any power to limit the right of citizens of the United States to migrate to new States. On the contrary, the *Edwards* Court, while basing its decision on the Commerce Clause, distinctly avoided stating that the Clause gives Congress any greater power than the States have to limit the interstate transportation of indigents. *Edwards*, 314 U.S. at 176. The fact that the Commerce Clause protects individuals against State abridgment of the right to travel does not mean that it authorizes Congress to regulate the right of citizens of the United States to choose their States of residency and citizenship, an individual right of national citizenship that does not rest on any grant of power to Congress.[19]

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[18] *See also, e.g., Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Jones v. Helms*, 452 U.S. 412, 419 n.12 (1981); *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8; *United States v. Guest*, 383 U.S. 745, 758 (1966).

[19] Congress also has express power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment. But as this Court has recently made clear, that is an enforcement power, not a power to define the substantive content of the Amendment. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Congress also, of course, has broad power to determine how federal dollars may be spent. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *United States v. Butler*, 297 U.S. 1, 66 (1936). But neither petitioner nor any amicus has suggested that the spending power entitles Congress to allow California in this case to discriminate on the ground of former residence in another State.

The Solicitor General also suggests (i) that the need to deny any welfare benefit resulting from migration to a new State is somehow an artificial consequence of the welfare system itself (U.S. Br. at 13), and (ii) that Congress's actions should be viewed with less suspicion because Congress does not have the same motives to discriminate against new State citizens as do the States themselves (U.S. Br. at 24-25). Neither of these arguments helps Section 604(c) save what California has done. A State cannot specially exclude new, bona fide in-migrant citizens from using its legislatively *created* benefits any more than it can specially exclude such citizens from its State wilderness areas or from farming its fertile land. And whether or not Members of Congress are less prone to parochial prejudices, the constitutionality of any such exclusion of new citizens does not depend on an examination of the subjective intent of the legislators. The unconstitutional feature of Section 11450.03 appears on the face of the provision: cases from *Shapiro* to *Zobel* and *Soto-Lopez* make it clear that States may not reserve their bounty for longer-term residents in an effort to deter migration.[20]

Finally, the Solicitor General also suggests that Congress has greater power than the States to burden the right to migrate, because Congress has a special interest in "the nature of a national Union, as opposed to a federation of independent States," and because Congress has a special

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[20] The Solicitor General refers to provisions like Section 11450.03 as "specialized choice-of-law rules." But at best that phrase evades the issue. California has *no* basis for "choosing" Oklahoma law to determine California's current benefits to a California citizen. The Solicitor General concedes as much: "Ordinarily, of course, there would be little or no justification for one State, in the administration of its own public benefits laws, unilaterally to apply the standards of *another* State's laws." (U.S. Br. at 24.) The point of Section 11450.03 is to penalize respondent Roe for her *former* residence in Oklahoma, in order to deter migration, and the issue, which cannot be avoided by artful phrasing, is whether California may do that.

relationship to fundamental rights of national citizenship. (U.S. Br. at 23.) This is a deeply troubling argument, because it ignores the fact that Congress itself has only the powers delegated by the Constitution and would give Congress, instead, a roving commission to define national citizenship. Congress does, of course, have specifically delegated powers to regulate how people born outside of the United States may become United States citizens, and to regulate many of the particular benefits and responsibilities of national citizenship, such as the obligation to pay federal taxes. But Congress does not have a floating general power to define the privileges and immunities of national citizenship. It does not, for example, have power to abrogate the "fundamental principle of our representative democracy [that] the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (internal quotations and citation omitted). We respectfully suggest that, like the right to choose national leaders, the right of each citizen to choose his or her State of residence and citizenship is a feature of citizenship in a "national Union, as opposed to a federation of States," a right of each citizen guaranteed by the Constitution itself,[21] not a gift from Congress or a benefit Congress may abridge.

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[21] In which, as Justice Kennedy has put it, "the whole people of the United States asserted their political identity and unity of purpose when they created the federal system." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

CONCLUSION

The decision of the court of appeals should be affirmed.

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